A guide to FARMLAND OWNERSHIP in Manitoba

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Manitoba

A Guide to Farmland Ownership in Manitoba

The surest way to reach a business goal is to plan on it. Successful Manitoba farmers are focused business people. They have clear, flexible, short and long term business plans – and they monitor their plans regularly.

Whether you're starting, growing or passing along your business, you need a solid business plan. Manitoba Agriculture can help you build a plan for success.

When you inherit, buy, rent or lease your farmland, you need a business plan that covers all aspects of ownership, including:

- **forms of ownership, rights and responsibilities**
- **buying, selling and renting**
- **titles, transfers and legal contracts**

Use this as a tool to help get you there.

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Part One: What is Land?

Definitions

Land

Land has a much wider meaning in law than it does in everyday conversation. Legally, when you agree to buy or sell a piece of land, you are agreeing to transfer ownership of more than just the dirt. Land, in law, includes the land but also any buildings, fixtures, crops, minerals and water.

All of your buildings are considered part of the "land provided that each is attached to your land on a foundation. Therefore, all buildings attached to a foundation form part of the land, unless the owner of the land and the owner of the buildings have entered into a written agreement that severs the buildings from the land.

Fixture

A fixture is anything that is attached to the land that cannot be easily removed. Examples of fixtures include buildings but also fences, septic tanks, silos, floor coverings, plumbing, built in cabinets, draperies, satellite dishes and light fixtures. Fixtures are also considered by law to be a part of the land. When the land is sold, all fixtures are automatically included in the sale. Therefore, you must specifically mention and exclude fixtures in the agreement of purchase and sale or they will be sold with the land.

Items like portable grains bins, portable fence lines, tools, furniture, machinery and fuel tanks are not considered to be fixtures.

Sometimes, disputes can arise as to whether an item is a fixture or not. This issue commonly arises with mobile homes. To be on the safe side, always list on the Agreement of Purchase and Sale which items will or will not be included in the sale.

Mineral Rights

The minerals, sand and gravel on and under your land, including oil and gas, are considered to be part of your land. However, most rights to the minerals on land in Manitoba have been purchased by and belong to the Crown. If you do own your mineral rights, the law presumes they will go to the buyer when you sell your land. However, there is no legal rule that the same person must own both the land and the mineral rights and surface rights. Therefore, you could keep your mineral rights when you sell your land as long as you specifically exclude them from the sales agreement.

Water

Bodies of water that are on your land that are permanent (ex: lakes, rivers and streams) are considered part of your land. However, they are owned by the Crown. The dividing line between your property and the Crown's property is usually the banks of the water body – where the soil changes or where the vegetation starts. Sometimes the boundary will be determined in a different way and you must check your Status of Title to be sure.

Non-permanent bodies of water on your land like sloughs or swamps belong to the owner. Title to this water will pass with the land when you sell it.

Forms of Ownership

There are several forms of ownership:

Sole ownership

If you are the sole owner of a piece of property, your name alone will appear on the Certificate of Title. You have complete control over how the land is used and disposed of. There is one important exception. Land that is considered your "homestead" (the place where you and your spouse or common-law partner have your home and the adjacent land up to 129.5 hectares or 320 acres) can be sold, mortgaged or leased only if your spouse or common-law partner consents in the proper written form. These rights are discussed further in this publication.

Joint Tenancy

Joint tenancy is one of the ways that two or more persons can own an estate in land at the same time. To create a joint tenancy, the words "as joint tenants" must appear on your Status of Title.

The major features of joint tenancy are as follows:

- All tenants own the same size interest or share in the property. If two people own a section of land in joint tenancy, each must own a one-half interest. Three persons owning the land would each have a one-third interest.
- All tenants are entitled to possess, use and enjoy the whole piece of property. For example, one tenant could not fence off part of the property for his or her exclusive use.
- All co-owners are listed on one title.
- There is a "right of survivorship" meaning that if one joint tenant dies, his or her interest in the property passes automatically to the remaining joint tenants to share equally. The deceased's interest does not and cannot become part of his or her estate.

These features make joint tenancy an attractive arrangement for married couples. If a couple owns the land in their farm jointly, and one dies, the other automatically takes full ownership of the property. The land does not form part of the deceased's estate and therefore the land does not need to be probated. This scenario will save the deceased's estate the cost of probate fees. Probate fees are $700 per $100,000 of assets. Please note that while joint tenancy has advantages for married couples, if land is not already held in joint names, transferring title to joint names by gift can have adverse tax consequences. You should discuss a proposed transfer with your accountant and lawyer before proceeding.

It should be noted that there may be exceptions to the right of survivorship, especially when property is owned jointly between a parent and a child. If the parent dies and the child does not provide consideration (payment) toward the purchase of the property, there is a legal presumption (which can be rebutted) that the deceased parent's estate will have a half interest in the property. The property will not automatically belong to the child by virtue of the right of survivorship. The child will have to prove that his or her interest in the property was intended as a gift to the child from the parent. If the child can show this intention, the property will transfer to the child by virtue of the right of survivorship.

If necessary, a court will determine if the deceased parent intended the asset to belong to the child or if it was intended that a one-half interest in the property belong to the parent's estate. Therefore, the parent should complete a declaration setting out his or her intentions for the property when the property is purchased or given to the child, if the child does not provide at least one-half of the consideration for the property.

For example, if two spouses owned four quarters of farmland jointly that had a total market value of $400,000, on the death of the first spouse, probate fees of $2,800 would be saved because of the joint ownership. A formal property transfer is also not required to change the title to the survivor's name. A survivorship request is filed in the Land Titles Office.

A joint tenancy ends when severance occurs. Severance is any action by one of the joint tenants that changes the agreement between the tenants. There are several ways a landowner can show an intention to sever the joint tenancy. These include:

- A joint tenant transfers his or her interest in the property to himself: this would be accomplished by a joint tenant registering a Transfer of Land in the Land Titles Office, transferring his or her interest in the property to himself, as an outward act showing an intention to sever the joint tenancy. Note that the Land Titles Office will not register a document severing tenancy unless the document is signed by all joint tenants, the joint tenants consent in writing to the severance or evidence is provided that all joint tenants who have not signed or consented to the document were served with the intention to sever at least 30 days prior to registration.

- A joint tenant signs a trust deed in favour of a third person: a trust deed is a legal agreement transferring property to a trust to be held for the benefit of a third person on the terms as set out in the agreement.
- Conduct that shows a clear intention to sever: the onus is on the party who seeks to establish the severance of the joint tenancy.

A joint tenancy can never be severed by a tenant gifting his or her interest in a will, because the deceased's interest automatically passes to the other tenants at the moment of death.

If a joint tenancy is severed because one party transfers his or her interest to another party, the joint tenancy changes automatically into a tenancy in common. The recipient of the interest would then become a tenant in common with the other tenants in a new arrangement.

Tenancy in Common

Tenancy in common is another way that two or more persons can own a piece of property at the same time. In one aspect, it is the same as joint tenancy because all involved have an interest in the whole property. Each tenant has the right to enter, use and possess all of the property.

However, tenancy in common differs from joint tenancy in the following ways:

- Tenants in common may have unequal shares in the property.
- Tenants in common do not have to become co-owners at the same time and by one title.
- There is no right of survivorship with a tenancy in common. When a tenant in common dies, his or her interest in the property becomes part of his or her estate to be passed on to the heirs instead of to the other tenants in common.
- The tenancy in common relationship does not end when a tenant in common transfers his or her interest. Instead, the party to whom the interest is transferred becomes a tenant in common with the others, replacing the former tenant. The interests of the other tenants are not affected or altered in any way.

The Rights of a Landowner

The rights of a landowner are not absolute. The rights you have over your land are determined by the nature of your interest in it, the claims of others and applicable laws.

Crown Rights

The Crown has an ongoing right over land in Manitoba. The Crown has the power to expropriate your land and is required to pay you adequate compensation for it. If you feel your compensation is inadequate, you can appeal to the Land Value Appraisal Commission. You should consult the advice of a lawyer to assist you with this process.

Municipal Government Rights

Your municipality has many rights that override your rights as a landowner. For example, a municipality may construct temporary roads across your property if other accesses to public roads are blocked. The *Municipal Act* of Manitoba states that a landowner will be compensated if the municipality uses private land temporarily as municipal land. Check your local municipality's by-law for the specific amount of compensation payable in your area. Municipal officials may also enter your land to survey, measure land levels and appraise land values. As well, the municipal government may sell your land if you fall behind in your land taxes.

In addition, a number of laws exist that can restrict how you use your farm property. For example, municipalities have been given the power to:

- regulate fires and combustible materials on your property
- inspect your buildings and order you to demolish or repair them
- order you to clean up accumulated garbage and old vehicles
- prohibit or restrict the location of your barns and animal pens
- control your use of landfill and removal of topsoil
- require you to control weeds on your crop land
- restrict you from subdividing your land

Easements

Other individuals and companies may have a right of access to your land in the form of an easement. An easement is created when you grant the owner of an adjacent property a right to enter, cross or use your land for particular purposes. An example is if you give your neighbour permission to use your driveway to get into their hayfield.

An easement can also be someone's right to prevent you from building a structure on your land or blocking a waterway.

Although not technically an easement, the most common right of way to your land is granted to public utilities such as Manitoba Telecom Services (MTS) and Manitoba Hydro. This arrangement works the same way as an easement. It gives the company the right to enter upon your property to fix, maintain or install wiring or cables over and beneath your land.

A valid easement can and should be registered against your title in the Land Titles Office to notify others that the particular rights exist. Once granted, an easement burdens your title to the land until it is removed.

Disputes over an easement can be avoided by making a clear agreement specifying the terms of the easement right, including any compensation to be paid. You should consult your lawyer to assist you in the drafting and execution of such an agreement.

Homestead Rights

If you are legally married or are in a common-law relationship for three years or more (or you have registered your common-law relationship under the *Vital Statistics Act*), your spouse or common-law partner has homestead rights over your homestead property. Your homestead is defined as the house that you and your spouse or common-law partner occupy as well as the immediately surrounding land (up to a maximum of 129.5 hectares or 320 acres). Even if you are the sole owner of your homestead, your spouse has three types of claims that could prevent you from having full control over your property. Fee Simple ownership is when the owner is entitled to the entire property, with unconditional power of disposition during one's lifetime and on one's death. This type of ownership is unlimited as to duration, disposition and descendibility.

First, if you wish to transfer your homestead by way of sale or gift, you need your spouse's or common-law partner's written consent. Your spouse or common-law partner will be required to sign the Transfer of Land that is to be registered in the Land Titles Office in front of a lawyer and separate and apart from you. If you do not have your spouse's or common-law partner's consent, you will not be able to transfer or sell your land.

Second, if you wish to mortgage your property, you need your spouse's or common-law partner's written consent. Your spouse or common-law partner will be required to sign the mortgage that is to be registered in the Land Titles Office. If you do not have your spouse's or common-law partner's consent, you will not be able to mortgage your land.

Third, if you die before your spouse or common-law partner and you do not leave your homestead to them in your Last Will and Testament, your spouse or common-law partner has a life estate in the homestead. This means your spouse or common-law partner will be entitled to live on the homestead until he or she dies and receive all of the income from the homestead until their death even if they are no longer living there. The person to whom you did bequeath the homestead will not be entitled to take possession of it until your spouse or common-law partner dies.

For example, Mr. and Mrs. Johnston were married for 35 years. They lived in a house on one-half-section of land owned in Mr. Johnston's name alone. Mr. Johnston wished for his son, Mr. Johnston Jr., to take over farming the land after his death. Mr. Johnston bequeathed the one-half-section of land to his son in his Last Will and Testament. Mr. Johnston subsequently died, but Mr. Johnston Jr. was not able to take possession of the land until Mrs. Johnston died, unless she agreed otherwise. Mrs. Johnson would be able to rent the land and receive all of the rental income.

Rights of a Leaseholder

If someone is renting land from you, they have the right to use and control it without interference by you as long as the lease lasts and as long as they follow the lease's terms.

The Leaseholder's rights may continue even after you transfer or sell the land. If the lease is for less than three years and the leaseholder is in actual occupation of the land, the lease would continue after the transfer or sale for the remainder of the lease term. In terms of occupation of the land, there is no requirement that the renter actually reside on the property or that there be other buildings such as grain bins in use or occupied by the renter. If the land is bare farmland and the renter is farming the land, the renter is occupying the land. Even if the land were sold in winter when there is no active farming, the renter would remain in occupation of the land. If the lease is for more than three years AND registered in the Land Titles Office, the lease would continue after the transfer or sale. Please note that it is always preferable to reduce lease agreements to writing which set out all of the relevant terms, are dated and are signed by the parties before a witness. While a verbal agreement to lease is binding on the parties, it is obviously much more difficult to prove the terms of the lease if there is only a verbal agreement rather than if the terms are put into writing.

The buyer would <u>not</u> have to honour the lease if it is for more than three years and not registered in the Land Titles Office. In this case and if the land is sold, your tenant could be stripped of any right to continue to use it, but may have a lawsuit against the vendor.

If you plan to sell leased land, the lease may contain a right of first refusal clause. This gives the tenant the first opportunity to match any existing offer and buy the property. Alternatively, the lease may contain a first option to buy clause. This right allows the tenant to purchase the property on the price and terms as specified in the option clause in the lease should the owner wish to sell the land. Usually your tenant must exercise the option within an agreed period of time, or the option is lost.

The Land Registration System in Manitoba

Manitoba's land interests are recorded under the Torrens System. When you become the owner of a piece of land, you record or register your interest by filing an ownership document. A Certificate of Title is produced by the Land Titles Office confirming ownership. If you have an interest or claim in another piece of land not registered in your name, you can register your interest against the owner's title by way of caveat.

There are six Land Titles Offices in Manitoba where land registries are made. This registration system is important to anyone wishing to secure their rights to a particular piece of land. If you fail to register your rightful interest in the land, you risk losing that right if it is challenged or disputed.

The most important feature of the Torrens System is that when you buy land, you can rely completely on the Certificate of Title. Everything listed on the title is presumed to be accurate.

The Land Titles Office used to issue original Certificates of Title. However, there were continual problems with Certificates of Title being lost or destroyed. As a result, the Land Titles Office no longer issues Certificates of Title. The information is now stored electronically at the Land Titles Office. As a result, the Land Titles Office now issues a Status of Title, which is a photocopy of your title including the name(s) of the owner, form of ownership, legal description and the description of all encumbrances and caveats. If you lose your Status of Title, you can simply order a new one from the Land Titles Office.

PART TWO: Buying And Selling Considerations

Are There Restrictions?

Before deciding to purchase or sell, ask yourself whether there are others who must consent to your decision to sell and whether they will actually do so. These persons may include your spouse or common-law partner, joint tenant, shareholder or partner.

Other individuals may have some claim to your property that must be cleared up before you can sell it free and clear. For example, if someone is presently renting your land, he or she may have rights which continue after the sale.

If you wish to subdivide your property, you must seek permission under *The Amendment Planning Act*. An application must be completed and approved by Manitoba's Minister of Municipal and Indigenous Relations. You may be required to submit a plan of subdivision prepared by a qualified land surveyor or a legal description drafted by a lawyer.

The law may restrict who you sell your property to. *The Farm Lands Ownership Act* states that only citizens of Canada or permanent residents of Canada may own more than 16.2 hectares or 40 acres of farm land (see "Who is affected by *The Farm Lands Ownership Act*?" on page 43). Corporations must fit into the Act's definition of a family farm corporation to be able to legally own farm land.

Agreement of Purchase and Sale

The amount of property and assets you include in your sale should be clearly stated in your Agreement of Purchase and Sale. When you sell your land, anything considered by law as part of the land (ex: any fixtures) are presumed to be included in the sale. (See Part One of this book for a detailed list.)

If you wish to exclude any fixtures from the sale, you and your buyer must have a specific agreement saying so. Otherwise, any fixtures will be transferred with the sale of the land. You must also specifically agree to any moveable farm assets you wish to include in the sale, for example, bins with no foundation. It is always wise to include in the Agreement of Purchase and Sale a complete list of all assets being included in the sale – both fixed and moveable.

For income tax purposes, you will have to allocate a certain amount of the purchase price to the land and a certain amount to the buildings. You do not need to do this in your sale agreement. You should consult a lawyer or accountant for tax advice prior to allocating the purchase price between land and buildings and for general tax advice prior to selling or purchasing farm land. Taxation issues are discussed in greater detail later in this publication.

Sample Allocation of Purchase Price:

Land (129.5 hectares/320 acres)	$150,000.00
Buildings	$ 50,000.00
Total Purchase Price	$200,000.00

Why is the Allocation of the Purchase Price Important?

The *Income Tax Act* allows an allocation of real property as between land and building. This allows a taxpayer to claim a capital cost allowance (tax depreciation) as an expense against business income at a stipulated rate for various types of assets of capital property. For most buildings used in farming, typically, this rate is calculated on a declining balance basis at 10 per cent of the original capital cost of the building. Such property is known as depreciable capital property.

For income tax purposes, farm land is no different than any other type of improved real property. On sale, one-half of the capital gain is included in the vendor's income and is subject to tax unless it qualifies for the capital gains exemption. Further, if any depreciable property is sold as part of the real property, then any capital cost allowance previously claimed may be recaptured on the sale if the sale price exceeds the undepreciated capital cost. Recapture is treated as regular income and 100 per cent of recapture is added to the vendor's taxable income.

No capital cost allowance may be claimed with respect to land, and consequently it is known as non-depreciable capital property. Because of this ability to claim capital cost allowance with respect to the improvements to real property, it is important in most farm transactions to allocate the purchase price between land and building. The seller will want less of the purchase price to be allocated to the buildings rather than the land. This will allow the seller to avoid any recapture on any capital cost allowance claimed. The purchaser will want more of the purchase price to be allocated to the buildings to leave room for depreciation. It is not necessary or even advisable that both parties use the same numbers. Therefore it is best to do this with your own lawyer and accountant.

Canada Revenue Agency (CRA) may examine this allocation. If CRA views an allocation to be unreasonable, they have the power to reallocate as they believe appropriate.

Methods of Selling

You must decide whether to sell your property through a real estate agent, an auction or by yourself (independent sale).

Real Estate Agent

Listing with a real estate agent has some advantages:

- You don't have to do the leg work of finding a buyer yourself.
- Your land should receive much wider advertising exposure, especially if sold through a multiple listing service.
- A real estate agent knows how to sell property, and may be able to sell your land faster and on better terms.

The main disadvantages of having an agent sell your land are:

- You must pay the agent a commission-either a straight fee or a percentage of the gross sale price (anywhere from two to ten per cent on farm land).
- You must sign a binding agreement with the agent that limits your control of how your land sale is handled. Please refer to the section entitled Listing with a Real Estate Agent later in this publication for more information on listing agreements.

Auction

Like a real estate agent, an auctioneer must be paid a commission ranging from three to ten per cent of the sale price. You must also sign a contract with the auctioneer.

Selling farm land by auction is becoming more and more common. Some benefits are:

- An auction creates competition among buyers and can exceed the price of a negotiated sale.
- An auction accelerates the sale process and the seller knows exactly when the property will sell.
- An auction enables the seller to set the terms and conditions of the sale and maintains control of the property throughout the sale process. Farmland could be offered for sale as follows: "Will be sold subject to the owner's approval" or "Will be sold subject to confirmation from owner."
- An auction is a very open environment that takes the seller out of the negotiation process, allowing everyone to have an equal opportunity to purchase the property. In many cases, friends and neighbors are disappointed after the private sale, feeling that they were left out of the negotiation process. This will not happen with a public auction.

Independent Sale

Selling your land yourself means that you can avoid commission costs and have more freedom to deal with potential buyers. However, there are some disadvantages:

- You have to pay advertising costs yourself.
- You probably don't have as much expertise in selling as a real estate agent.
- If you are in a hurry to sell your land, an independent sale may not be the best for you.

Who Should I Talk To About the Purchase or Sale?

Because your financial and personal circumstances are unique, no amount of reading about selling farm property is a substitute for talking to qualified professionals such as your lawyer, your financial institution, your accountant and your real estate agent. They can help you plan your property sale to meet your needs and goals. They can make suggestions and ask questions you may not have considered.

Other sources of advice are Manitoba Agriculture representatives, Assessment Offices, lenders and appraisers who are trained to deal with problems and questions about farm matters.

Tax Considerations for Buyers and Sellers

One of the most important considerations influencing your purchase or sale decision is tax. Your desire to minimize your income tax will affect whether you gift rather than sell, what you sell, when you sell and how you arrange to be paid.

The income tax rules that affect land sales and transfers are complex and change constantly. You should always seek sound professional advice before making a decision. Do so well in advance as good tax planning often means planning for your sale years before it actually occurs.

The following information is intended only to provide a general overview of the income tax rules that apply to the sale of farm land. Please consult your professional accountant to review your individual income tax considerations.

Real Property Taxes

Tax adjustments on farm sale transactions are frequently made as of January 1, rather than as of the closing date. The intent in such cases is generally to have the party who will realize the crop for that year become responsible for payment of the taxes. Pursuant to *The Law of Property Act,* if adjustment is to be made as of a date other than closing, there must be specific reference in the Agreement of Purchase and Sale.

Land Transfer Tax

Land transfers in Manitoba are generally subject to a progressive land transfer tax payable at time of registration of transfer documents in the Land Titles Office. Farm transactions are exempt from the tax so long as ALL three conditions are met:

- The purchaser is a farmer or a spouse or common-law partner of a farmer, or a family farm corporation.
- The land is farm land.
- The land will continue to be used for farming purposes.

Most often the exemption would be applicable in farm land transactions.

GST

In addition to the income tax ramifications of real estate transactions, there is also the possibility that the Goods and Services Tax (GST) might apply. Starting on January 1, 2008, the GST is applied at the rate of five percent to most sales of goods and services in Canada.

The obligation to collect the GST on real estate transactions varies depending on the type of property being sold, the nature of the buyer, and the nature of the seller. Generally all sales of real estate are subject to GST unless a specific relieving provision in the *Excise Tax Act* (Canada) applies.

The GST will apply to a farm land sale in the same way it would apply on the sale of any other type of commercial property. However, if the sale of the farm property is from an individual to a related individual who will use the land for his or her personal enjoyment and not in the business of farming or other commercial activities, there will be no GST on the sale.

Further, a GST exemption will apply if:

- The sale is by a corporation, partnership or trust, when the buyer is a shareholder, partner or beneficiary and in the case of a corporation, is related to the corporation.
- All or substantially all (generally taken to be 90 per cent or more) of the seller's property was used in the business of farming.

- Immediately prior to the sale, the buyer was actively engaged in the business of the seller.
- The buyer will use the land for his or her personal enjoyment.

If all these conditions can be satisfied, then a GST exception will apply.

The obligation to pay five per cent on the purchase of commercial real property can often be a cash flow concern to a buyer, especially if the buyer is a registrant for GST purposes and will be able to claim the GST as an input tax credit and in a sense, get the tax back. To relieve this cash flow problem, there is a self-assessing option. The *Excise Tax Act* allows for the self-assessing of the GST by a buyer of real property, where the buyer is registered for GST purposes.

If the buyer intends to use the property in his or her business, then he or she reports the tax due on the purchase on the GST tax return for the period covering the closing date. On that same tax return the buyer claims an offsetting input tax credit which equals the tax self-assessed. The net effect is that no money is laid out. This self-assessment applies equally to individual purchasers or corporate purchasers. This concept is illustrated by the example below:

> A Ltd. sells a one-quarter section of farmland to B Ltd. for $100,000.
>
> B Ltd. self-assesses $5,000 GST on its next GST tax return covering the closing date for the GST due on the sale. On the same return B Ltd. is entitled to claim an input credit of $5,000 for the tax payable on the sale. Net cash outlay ($5,000 - $5,000) is zero.

Unfortunately, if the buyer of the property is not a registrant, then this option to self-assess is not available to the buyer and the cash flow problem discussed above can occur.

Mortgage Back

A seller may finance the buyer of farm land by taking back a mortgage. For income tax purposes, a seller who does not receive all of its proceeds at the date of sale may be able to claim a deferral of a portion of the capital gain, if any, which has occurred on the sale. However, a minimum of one-fifth of the gain must be brought into income in each year, unless the sale is to a child or grandchild, in which case a minimum of one-tenth must be brought into income. This essentially limits the deferral to five or ten years. This rule exists in spite of the fact that the mortgage might be for a longer period. Of course, if the mortgage is for a shorter period and all of the proceeds are received before the end of the five or ten years mentioned in the Act, then the gain must be reported in that shorter period. There is no reserve permitted for recaptured capital cost allowance.

A second issue to consider any time a seller assists in the financing of the purchaser is interest. It is normal commercial practice in a mortgage to seek interest on the monies not yet received. There is, of course, no legal obligation to charge interest.

Principal Residence Exemption

A special capital gains exemption exists for the sale of what is known as a principal residence. A "principal residence" includes a housing unit, and up to half a hectare (approximately 1.2 acres) surrounding the housing unit. The residence may be owned either alone or jointly with another person, and must have been ordinarily inhabited during the year by the seller or the seller's spouse or family. Only a Canadian resident can claim the Principal Residence Exemption. If those conditions are met, the gain on the residence will be exempt from income tax. In some circumstances - for example, where the rules of the municipality do not permit lots to be smaller than a certain size - more than one half hectare may be considered part of the principal residence. Consult with your accountant and lawyer before claiming the principal residence exemption on a residence located on a lot that is greater than one half hectare in size.

Farm Rollover

There are two provisions of the *Income Tax Act* which allow for income tax free sales of farm property. The first is a sale or gift by an individual to that individual's child, so long as the property involved is qualifying farm property. Qualifying farm property is land, depreciable property of a prescribed class and any eligible capital property used by the individual or the individual's spouse or children in the business of farming. To qualify for this rollover, the child of the seller must be a Canadian resident. This rollover also applies to the transfer of shares in a family farm corporation or an interest in a family farm partnership by an individual to a child who is a resident. The parties can elect that a sale take place at any number between the cost base and fair market value of the property. A gift is treated as though the parties elected at the property's cost base.

If a full rollover is not required there is an opportunity to defer any capital gain from the sale of farm property from a parent to a child so that only one-tenth of the capital gain is brought into income each year. A farm rollover is advantageous only after the benefits of the capital gains exemption have been considered.

Please note that the *Income Tax Act* contains anti-avoidance provisions that may be triggered if the child receiving property under the farm rollover disposes of, or makes arrangements to dispose of, that property within 3 years of receiving it. In such a case, CRA may cause the tax consequences of the disposition to attribute to the parent rather than to the child disposing of the property. If transferring property to a child using the farm rollover, ensure that you and your child consult with your tax advisor so they do not take actions which have unintended tax consequences.

Spousal Rollovers

If one spouse transfers property to the other spouse for nominal consideration or by way of a gift, a specific rule dealing with sales between spouses will deem this sale to occur not at fair market value, but at the seller's cost base, unless both parties elect otherwise. This means that spouses may move property between themselves at no tax cost. However, any income earned from the property and capital gain realized on a subsequent sale by the recipient spouse will be attributed back to the seller spouse. Such attribution is avoided if the buyer pays fair value for the property purchased (and if payment is over time, the vendor must charge CRA's prescribed rate of interest for the transaction to be considered to be at fair market value). Unlike the farm rollover, the spousal rollover does not permit election at values between cost and fair market value – the transfer must either be a gift or a sale at fair market value.

GST will generally not apply to property transferred in an inter-spousal situation, as generally that property tends to be of a personal nature, is residential and is therefore exempt from GST. However, if both spouses are registered and the property in question is business property, then presumably the GST could apply. The same rules apply if the property is being transferred as a result of a separation or divorce.

Capital Gain v. Business Income

Any transaction involving real property will generally give rise either to an income gain or a taxable capital gain. The difference between the two treatments is generally determined by the intention that the seller had when the property was purchased. For instance, if the seller purchased the property with the intent to resell, then the property will be treated as inventory, creating an income gain. However, if the seller purchased the property with the intent of using it in a business or for personal enjoyment, then the gain, if any, on its subsequent disposition would be treated as a capital gain. The importance of having the gain treated as a capital gain is that only one-half of the gain will be included in the seller's income and subject to taxation. If the gain is considered to be on the income account, all of the gain will be subject to taxation. In determining the intent of a party when purchasing land, the courts have looked at stated intent, past dealings in similar property, the business of the purchaser, and other such indicia. Generally, farm land will be considered to be used for business resulting in a taxable capital gain rather than an income gain. Please review the discussion respecting the capital gains exemption further on in this publication for more information on the capital gains exemption.

Capital Gains Exemption

Further, there is a $1,000,000 capital gains exemption per person with respect to any capital gain realized on farm property, regardless of who the purchaser is. To qualify for this exemption, the land must be qualified farm property. This exemption will also apply to shares of family farm corporations and interests in family farm partnerships. Treatment of farm property varies, depending on when the property was acquired. The test for how long the property must have been used in farming is different for property owned prior to June 18, 1987 than for property acquired after June 17, 1987. (Please refer to the Manitoba Agriculture publication *Taxation - Capital Gains and Losses.)*

Deemed Disposition at Death

An individual is deemed to dispose of all the property that he or she owned immediately prior to death. This means that at the date of death all real property will be deemed disposed of at its fair market value. There are two specific exceptions to this rule. The first is that any property left to a spouse or a spousal trust will be considered to be sold by the deceased at his or her cost base, ensuring that there will be no capital gain on the death. A similar rollover applies to farm land left to a child. In that situation, the land is deemed to be disposed of at the seller's cost with no gain realized. However, you can elect to use your capital gains exemption in your year of death to increase the cost base for your heirs. This is almost always advisable.

These two exceptions ensure that there is no gain at death, and defer that gain until the spouse or child disposes of the property or until they die. For this purpose, the spouse or child will inherit the seller's cost base and be subject to the gain that has been deferred, plus any gain the property subsequently accrues because of appreciation in value during their lifetime.

With respect to deemed dispositions at death, because the GST only applies to sales made in the course of the business, a deemed sale on death will not be taxable. Further, the testamentary gift of the property will also not be considered to be a disposition in the course of business and will likewise not be subject to GST.

Change in Use

A sale is deemed to occur when the use of property changes. For instance, if property is purchased for personal use and is subsequently used in a business of the taxpayer, there will be a deemed disposition at the date of the change of use. This could create a capital gain if the change is from personal use to business use. If the change in use is from business use to personal use, it could also create recaptured depreciation.

Change of use occurs most often with respect to individuals owning land. Often the deemed sale on the change of use by an individual will go unreported, because the individual will not change the title to the property and will not seek professional advice. This can result in a reassessment some years later from CRA. It is therefore incumbent upon advisors when advising persons who are retiring from business but holding onto the real property involved, that there might be a change in use from a business use to a personal use, which could trigger tax. This deemed sale will not occur where an individual rents real property to a successor in business. It would occur, however, where the property is retained and turned into a personal residence.

The GST will apply to changes in use when the change in use is from business to personal use or from personal to business use. This obligation to pay tax when no actual proceeds have been received can cause cash flow problems.

Involuntary Sales

An individual must report capital gains or recaptured depreciation on involuntary sales of land. Involuntary sales of land typically occur where the property is destroyed by fire or some other calamity or is expropriated. If the property is destroyed and insurance proceeds are received, the insurance proceeds will be considered to be the proceeds received on disposition and all appropriate calculations will be made. The same rule applies with respect to expropriation proceeds.

Typically insurance adjusters can resolve the value of the real property fairly quickly and payment can be made within a reasonable amount of time. Valuing the real property on an expropriation, however, can take several years. Typically, there is an expropriation order and an initial offer made by the government authority involved. It is not unusual for this offer to be refused and for there to be litigation with respect to the valuation of the property. It can take some years before final expropriation proceeds are subsequently determined.

For income tax purposes, it is not until the final appeal period has run with respect to all potential litigation that the property is deemed to be disposed of. Consequently, the disposition can be some years after the property has actually been taken by the government authority. The replacement property rules would apply to such involuntary sales so that if the person has replaced the property that was destroyed or expropriated, the proceeds received can be used to grind the capital cost of the property used to replace it, and deferral of the gain or recaptured depreciation. The replacement property rules are rules set out in the *Income Tax Act*. In summary, an individual has two years to replace a property if it was involuntarily disposed (i.e. fire) and one year to replace the property if it was a voluntary sale. The gain (including recaptured depreciation), if a replacement property was purchased within the required time frame, can then be deferred. The way it is deferred is the capital cost (or undepreciated capital cost) of the replacement property is then reduced (i.e. ground down) by the amount of the gain. Essentially, you are able to defer the recognition of the gain until the replacement property is ultimately disposed of.

PART THREE: The Sale Process

Fixing a Price and Terms

Once you have decided to sell, your first step may be to determine your asking price by having your land appraised. You can pay a land appraiser to do so or you can have a real estate company determine the market value. Your lawyer and accountant may know the value of farmland in your area. At this point, you should be able to decide what price you want for your land, what price you will settle for and on what terms (i.e. possession date) you will sell. Please review the Terms to Be Included section later on this publication for further information on what terms should be determined.

Listing with a Real Estate Agent

The job of a real estate agent is to bring buyers and sellers of property together. The agent acts as the seller's representative during the sale. As a seller, you should expect your real estate agent to work for your best interests. He or she is legally obliged to:

- obey your instructions
- do his or her job competently
- get the highest possible price for your land
- tell you anything that is to your advantage (for example, the agent might know of someone who would make you a higher offer than the one you have already received)

Real estate companies may approach you with their services. Before you choose, shop around. Look for a company that has experience in farm property sales, or better still, one that specializes in farm real estate.

The Listing Agreement

Once you choose your real estate company, you must sign a listing agreement. This is a binding contract between you and the realty company; it lists the terms under which the company will try to sell your property.

One of the major components of the listing agreement is the listing period. This is the length of time your agent has to find a buyer in order to collect the commission. Most listing periods for farm land are between six and twelve months. Your listing period should only be for as long as you are prepared to commit yourself to selling on the terms specified in your listing agreement.

The listing agreement also includes:

- a description of the land being sold and what is included with it
- an acceptable price and sale terms
- a possible possession date
- the real estate agent's commission fee and when it is payable

There are three types of listing agreements:

Open Listing: Where an owner gives one or more realtors the authority to find a buyer for the property, while the seller reserves the right to try to sell it. These are more common with commercial properties. These agreements may be written or oral. The terms usually allow the realtor to bring buyers to view the property and require the owner to pay commission if the realtor is successful in selling the property to that buyer. This type of listing cannot appear on a multiple listing system.

A variation of the open listing is a fee agreement. This is most often used between a realtor and a "by owner" seller, where the realtor has a specific buyer in mind for the property.

Exclusive Listing: This form of listing gives one realty broker the authority to act on the seller's behalf. Exclusive does not mean the brokerage can unilaterally keep the listing to itself and prevent other brokerages from showing or selling the property, unless the client has very specifically requested such an arrangement. While most sellers want the best exposure possible, there are circumstances where a seller may have need for privacy or wish to exclude ALL other brokerages from conducting showings and bringing offers.

Multiple Listing Service Listing: The Multiple Listing Service (MLS) is a cooperative arrangement managed by real estate boards as a service to their membership. The system enables realtors to cooperate in the showing and selling of properties listed by all other realtors thereby encouraging transactions between clients of all cooperating brokerages. This system can be an advantage to a seller wanting wide exposure for the property.

Paying the Agent

A real estate agent is always paid a commission for his or her services. It could be a fixed amount or more commonly a percentage of the sale price. Commission is payable only if the property is sold in the specified listing period.

The agent is usually paid when the sale is closed (completed). The commission will be paid out of the purchase proceeds and go directly to the agent, via your lawyer. If the selling agent is different than the listing agent, each agent will receive one-half of the agreed upon commission. The seller will pay the entire commission to the listing agent. The listing agent will forward to the selling agent, his or her one-half share.

You must treat your agent fairly and ethically. You cannot make a private deal with a buyer to accept his or her offer after the listing agreement has expired in order to avoid paying commission. If a buyer approaches you after this period, before you agree to sell your land, obtain proof such as a signed statement that he or she has not been referred to you by the agent. You may have to pay a commission if you sell your land within a few months after your listing period expires. Most real estate agents put this holdover clause in their listing agreements. The holdover clause must be a specific term in the agreement in order for it to be applicable but this type of clause is a standard clause included in most if not all listing agreements.

Problems with your Realtor

If you have a concern about the services which have been provided by the realtor, you should consider the following options:

- First, discuss the concern with the realtor involved.
- Raise your concern with the broker/manager of the real estate office.
- If your concern is with respect to a financial matter or a civil claim for compensation, you should seek legal advice as to your rights and obligations.
- If your concern does not involve a claim for compensation, but is an ethical concern, you can direct a written complaint to the Manitoba Real Estate Association for review.

Agreement of Purchase and Sale

Offer to Purchase

When land is sold, the buyer and the seller enter into a contract. A contract is an agreement or promise that can be legally enforced. Usually the seller and the potential buyer enter into negotiations to see if an agreement is possible. If a real estate agent is handling the sale, he or she will usually negotiate on the seller's behalf.

The buyer will formally propose to buy the seller's land by making an offer. An offer is usually in written form and it sets out the terms and conditions of the sale that the buyer is prepared to meet. If the person receiving the offer accepts, then both parties are bound by its terms. The accepted offer is a contract for sale – most commonly referred to as an Agreement of Purchase and Sale. The offer is not a preliminary or interim contract whose final details can be worked out later. It is therefore essential that all necessary terms and conditions of sale be included.

The offer to purchase should contain:

- full names and addresses of the buyer and the seller
- a legal description of the property for sale
- a list of all assets being included in the sale
- the price being offered

- the amount of deposit accompanying the offer
- the amount of commission required by the real estate agent
- the date the offer was made and when it will expire
- the conditions accompanying the offer (such as financing being arranged)
- any other terms and conditions of sale (see requirements of a valid contract later in this publication).

Conditions

The offer to purchase can be drafted by either of the parties, a lawyer or by the real estate agent. If a lawyer is not involved in the drafting, it is wise to have it checked by a lawyer before you sign. If it is not possible to get a lawyer's advice due to time or other constraints, the buyer can put a condition in the offer that says it is valid only upon approval of a lawyer within a particular time period. If the lawyer later does not approve, the offer can be cancelled, even if the buyer has already accepted it.

There are other conditions that can be written into an offer to purchase, and the document then becomes a conditional offer to purchase. Other conditions might be that the buyer first sells his or her existing property or that the sale is valid only if the buyer can arrange financing. If the conditions in the offer are not met, the sale will be automatically cancelled and the buyer's deposit money will be returned.

The seller should insist a time limit be put on any conditions in the offer to purchase. Otherwise, the conditions will be presumed to expire on the date that the property passes to the buyer (the closing date). If, on the closing date, the conditions are not met, the sale will be cancelled.

A final note on offers to purchase is to caution against using a standard, pre-made offer to purchase form. You may be able to find such forms on the Internet, from a neighbour or from an old offer to purchase you were once involved in. Many farm sales are not standard. Each sale is unique and the offer to purchase should be written up by a lawyer to reflect the unique and individual aspects of your purchase or sale.

Sewage Ejector Systems

In 2009, changes to the Manitoba *Onsite Wastewater Management Systems Regulation (MR 83/2003)* resulted in the prohibition of new sewage ejector systems and the phasing-out of existing sewage ejector systems throughout the province. This means no new sewage ejector systems can be installed and that existing ejector systems cannot be replaced, modified or expanded; minor repairs to an existing sewage ejector system are allowed. This also means that when a property owner wishes to sell or subdivide their land, the existing sewage ejector system must be taken out of service, decommissioned and replaced with an approved onsite wastewater management system, such as a septic tank and disposal field, before the land is transferred or subdivided. However, in accordance with Section 14.3 of the regulation, a land owner can apply for a Certificate of Exemption which, if approved, would allow the sewage ejector system to remain in operation provided it meets the requirements of Section 14.3 and Schedule E in the regulation. These requirements include but are not limited to:

- the land parcel must be a minimum size of 4 hectares/10 acres (note: minor exceptions may be considered on a case-by-case basis);
- the sewage ejector discharge pipe must meet all horizontal setback distances (e.g., 61 metres/200 feet from a water course, well, property boundary and residence);
- all wastewater effluent from the ejector system must be contained within the boundaries of the property onto which it is ejected, and
- the existing ejector system is not located in a Sensitive Area, the Red River Corridor Designated Area, a Provincial Park, a Crown Land Cottage Subdivision or Nutrient Management Zone N4 (land classified as soil class 6 or 7, or unimproved organic soil).

Application for a Certificate of Exemption must be submitted to the local Regional Environment Officer prior to the planned transfer or subdivision of land. Once the application and required fee are submitted, an Environment Officer will perform a site inspection and either issue the Certificate of Exemption (conditions may apply) or refuse the application due to non-compliance with Section 14.3 and/or Schedule E.

When an application for a Certificate of Exemption is rejected, the property owner will be required to decommission the sewage ejector system and replace it with a new, approved onsite wastewater management system before the land can be transferred or subdivided. However, if the parties agree (buyer/seller), the buyer may be granted approval to assume responsibility for decommissioning and replacing the ejector system. This requires the buyer and seller to submit a joint application for Assumption of Responsibility to the local Regional Environment Officer. If approved, the buyer (new property owner) will have up to two years to decommission and replace the existing sewage ejector system.

Information on the phase-out of sewage ejector systems, application forms, regulations, decommissioning guidelines and other information related to the Onsite Wastewater Management Program can be found on the Manitoba Sustainable Development website at the following link:
http://www.gov.mb.ca/conservation/envprograms/wastewater/index.html

Therefore, if you are wishing to buy, sell or subdivide property that contains a sewage ejector system, keep in mind that this issue must be addressed. How the buyer and seller agree that this issue will be handled should be a part of the Agreement of Purchase and Sale. As discussed in this publication, you cannot add conditions to an Agreement of Purchase and Sale unless the other party agrees. As a result, it is important this issue is addressed prior to executing the Agreement of Purchase and Sale.

In summary, the options available for the sale or subdivision of property containing a sewage ejector system are:

(1) The sewage ejector system needs to be taken out of service, decommissioned and replaced with a new, approved onsite wastewater management system. The property owner (seller) can do this or the new owner (purchaser) can do this provided an Assumption of Responsibility is approved. Issuance of an Assumption of Responsibility may be advantageous if the parties want the sale to proceed quickly and do not want to wait for the legal owner (seller) to complete the required upgrades. This may affect the purchase price as the purchaser may agree to purchase the property at a reduced price and take responsibility for decommissioning and replacing the ejector system;

(2) The land owner (seller) may apply for a Certificate of Exemption. If approved, the sewage ejector system can remain in operation;

However, as this issue may affect the price of the property and either the seller or the buyer's responsibilities, the parties must agree on how this will be dealt with prior to entering into the Agreement of Purchase and Sale. In addition, the agreement of purchase and sale must set out each party's obligations with regard to the sewage ejector system.

Manure Storage and Handling

The Livestock Manure and Mortalities Management Regulation under *The Environment Act* of Manitoba requires that manure be stored either as field storage or in a manure storage facility until it can be applied to agricultural land at rates in compliance with the regulation. Winter application of manure is now prohibited for all livestock operations, this took effect November 10, 2013.

A manure storage facility is defined as a structure, earthen storage facility, molehill, tank, or other facility for storing or treating manure and includes any permanent equipment or structure in or by which manure is moved to or from the storage facility.

Field Storage – Only solid manure may be stored temporarily as field storage; that is, stored in the open air other than a manure storage facility. It must be removed by the following fall of the year that it was stored. A crop must be grown to remove accumulated nutrients before manure is stored in the same location again. Long-term manure piles that are stored in the open air are not in compliance with provincial regulations.

All manure storage facilities not constructed under the authority of a permit must be registered with Manitoba Sustainable Devleopment by November 10, 2010.

If you are buying a farm involving any type of livestock, including poultry, ensure that any manure storage facility was constructed under the authority of a permit issued by Manitoba Sustainable Development or, if the storage facility is an older facility, that it is registered with Manitoba Sustainable Development. Some operations are operating under interim registration and may be required to take action before full registration is granted. Ask the seller for a copy of the permit certificate acknowledgement letter or the registration certificate letter issued by Manitoba Sustainable Development. You may also ask the seller if he or she has records of recent inspections conducted by Manitoba Sustainable Development and if there are any outstanding orders or enforcement actions.

You should also ask the owner for a copy of his manure management plan, which must be filed with Manitoba Sustainable Development annually for certain operations.

If any permits or registrations are required or if there are any outstanding orders or actions that need to be taken, these need to be addressed as conditions to the offer before the Agreement of Purchase and Sale is finalized and executed.

If the buyer fails to require the seller to fix and/or address these issues before the Agreement of Purchase and Sale is executed, the buyer may be required to accept the property as is and will become responsible for any outstanding issues with Manitoba Sustainable Development .

Odor, Noise or Dust Complaints

Pursuant to *The Farm Practices Protection Act* of Manitoba, any complaints from nearby neighbors related to odor, noise or dust must first be dealt with before the Manitoba Farm Industry Board. The purpose of the Act is to protect farmers engaging in normal farm practices from nuisance actions in the civil courts. Normal farm practice is defined in the act as one that is conducted in a manner consistent with proper and accepted customs and standards as established and followed by similar agricultural operations under similar circumstances, and includes the use of innovative technology used with advanced management practices, and in conformity with any standards that are prescribed by regulations.

The Board provides for a quicker, less expensive and a more effective way than lawsuits to resolve complaints about farm practices. The Board may help in creating an understanding of the nature and circumstances of farm operations where none existed previously. It may also be able to bring about changes to the mutual benefit of all concerned, without the confrontation and unwarranted expense of court. If the practice of the farmer is not considered normal farm practice, the Board may issue orders requiring the farmer to remedy the problem. If a board order is not followed, the farm practice and farm operation (1) could be subject to court imposed enforcement and remedies and (2) could be liable to further action under other environmental and health protection legislation.

Before purchasing an active farm, ask the seller whether there are any orders issued under *The Farm Practices Protection Act* of the Manitoba Farm Industry Board. Again, if there are outstanding orders, these need to be dealt with prior to executing the Agreement of Purchase and Sale.

Acceptance

The offer to purchase must be accepted in the exact form it is presented within the time limit specified. After the expiry date, the offer is automatically over. If no expiry date is indicated, the seller has a "reasonable time" period to respond.

The offer can be communicated in written form or verbally. When it is accepted, there is a binding contract for sale. The buyer and the seller are both legally bound to the buy and sell the property. If either party attempts to cancel the sale, they could be sued for breach of contract and for substantial performance. The Court may require the party trying to back out of the deal to complete the purchase or sale. The buyer could also lose his or her deposit.

Counter-Offers

If the person receiving the offer proposes a change in its terms, he or she will make a counter-offer. It is a new offer and the original offer is no longer valid. The count-offer can be accepted or another counter-offer proposed.

If the seller wants to accept only part of the buyer's offer, he or she must draft a counter-offer. This is a new offer that cancels out the original. If accepted by the buyer, this counter-offer then becomes the sales contract.

Any number of counter-offers can be made, each one cancelling out the last. Neither the buyer nor the seller can use a previous counter-offer if there is another one dated after it.

Requirements of a Valid Contract

A contract for sale must contain several elements in order for it to be legally enforceable.

Consideration

A contract is a bargain and in order for it to be enforceable, both parties must pay a price. That is, each must do something in return for the promise obtained from the other party. In legal language this price is called consideration. In a land sale, the seller gives the buyer title to land as consideration for the buyer's promise to pay.

Intention to be Legally Bound

Before a contract is legally enforceable, both the buyer and the seller must intend to create a legally binding agreement. If there is a dispute on whether it is binding and the contract does not specifically say so, a court will have to make this decision. In doing so, it will make the following assumptions:

- A written sales contract is stronger evidence of intent to be bound than an oral contract. Even though the law no longer requires all contracts for land sales to be in writing, it is wise to do so. A written contract has greater legal force and the details are easier to prove;
- The very nature of a land sale makes it likely that the parties intended to be bound (because a large sum of money is involved it can be assumed the parties are dealing seriously).

Legality

A contract must be legal to be enforceable. That is, it must not go against written laws or public policy. Examples of illegal contracts for the sale of land are:

- Those that sell more than 16.2 hectares or 40 acres of farm land to a person who is not a Canadian citizen or a permanent resident of Canada;
- Those that do not have the Homestead Consent of the seller's spouse if the seller was indeed selling their homestead property.

Certainty of Terms

An offer to purchase cannot be accepted and cannot form a valid contract if its terms are uncertain – that is, if any important terms are missing altogether, it is not stated clearly or is left to be agreed upon in the future. For land sale contracts, there are three essential terms that must be included:

- the parties to the agreement
- the legal description of the land being sold
- the purchase price

If any of these have been left out, the sales contract will be void.

Terms to be Included

Besides the three essential terms listed above, you need to include other terms in your contract for sale of farm land in order to make it as clear and complete as possible. These will be in your original offer to purchase. Some that might be included are:

- date the offer expires
- terms of payment
- whether the buyer will take over the present mortgage or take out a new mortgage
- amount of deposit required with the offer
- provision for the return of the deposit if the offer's conditions are not met
- a list of assets being sold with the land, and the value of each (portion of total purchase price each asset represents)
- provision allowing the seller to keep anything that would normally pass to the buyer with the land (ex: fixtures)
- closing date or date that the buyer receives possession of the property and the seller receives the purchase price
- adjustment date or date that the buyer must begin paying for all items that the seller has paid for in advance (ex: land taxes or utilities); this date is often the same date as the closing date
- conditions of the sale such as the buyer getting financing or the buyer selling his or her title
- an expiry date for each condition
- provision that the person protected by a condition may waive the condition; for example, the buyer may allow the sale to go through without having sold his or her property
- provision allowing the seller an ongoing right of access to the property after it is sold – for example, the right to continue storing grain in the bins on the property
- provision dealing with existing leases and lease payments

- provision as to who is going to pay for the legal fees and disbursements (out of pocket costs) for transferring the title and registering the mortgage at the Land Titles Office
- who will carry the risk of the property being damaged between the date the contract is signed and the date the sale is complete
- whether GST is payable
- a provision that says interest will be paid to the vendor, if payment of the purchase price is delayed past the possession date, by the time required for registration of the mortgage to be completed by the Land Titles Office, and reported at the same rate as the new mortgage until paid

If the sale is being financed by the seller, these terms should appear in the sales contract:

- down payment required, if any
- size and schedule of payments
- interest payable, if any

Because each sale is unique, your sales contract will probably contain some terms not listed here – terms that reflect your particular circumstances. Ensure that all of the details of your agreement are included and clearly stated.

Financing The Purchase

One of the most important aspects of negotiating a farm sale is how the sale will be financed. This discussion focuses on the legal aspects of financing the sale, including the legal obligations of the buyer and the seller to one another.

Deposit v. Down Payment

A deposit is a sum of money that the buyer gives at the time of signing the offer to purchase to show the offer is serious. If the sale goes through, the deposit goes toward the purchase price. There is no required amount – it is what the parties can agree on. It is not required by law, but the seller will generally insist on one. If the seller backs out of the deal or if the sale conditions are not fulfilled, the deposit will be returned to the buyer. If the buyer backs out of the deal, the seller will keep the deposit.

A down payment is the amount of money the buyer pays to his or her financial institution toward the total purchase price. Financing is arranged over and above the down payment amount. Your financial institution may require up to 25 per cent of the purchase price as a down payment.

New Mortgage

The most common way of financing a land purchase is by way of a new mortgage. When you arrange a new mortgage with a lender, you enter into a contract that gives both you and the lender certain legal rights and obligations.

As the borrower, you receive a loan, in return for which you make a personal promise to repay the loan and pledge the property you are buying as security or collateral. By this pledge, you give the lender an interest in your property.

Most lenders will secure this interest by having the mortgage registered as a charge on your Certificate of Title. This does not mean that the lender owns your property. You will appear as the registered owner on the Certificate of Title. However, it does mean that the lender has the right to take possession of your property, or foreclose, if you do not meet the terms of the mortgage – that is, if you do not make your mortgage payments, pay your property taxes or if you allow the property to deteriorate drastically.

If you comply with the terms of your mortgage, you are entitled to use the property as you wish, without interference from the lender. When you have completely repaid the mortgage, the mortgage contract ends and the lender has no further rights to your property.

As a buyer, you should always make your offer to purchase on the condition that you can obtain financing. If you cannot obtain financing before the date specified, the condition will not be fulfilled and the sale will not go through.

The Buyer Assumes the Existing Mortgage

If the seller has not fully paid for the land you are buying, you may be able to take over the seller's mortgage instead of arranging a new one. To do so, you must have approval of the seller's lender. Some lenders will not allow mortgages to be transferred.

With interest rates being low, this option is less common than it was in the past. This is advantageous if you would be unable to obtain a new mortgage with the same or a lower interest rate than the existing mortgage.

If the buyer assumes the seller's mortgage, the seller must ensure the financial institution specifically releases the seller from the mortgage obligations. Otherwise, the seller could still be held liable for the debt.

The Seller Takes Back a Mortgage

When the seller takes back a mortgage, he or she gives the buyer a loan toward the purchase of the land. The loan could be for the total purchase price or a portion of it. The buyer then makes the mortgage payments to the seller, who has the same rights of foreclosure as any other lender.

In order to ensure the seller has all of the rights of a lender, a mortgage should be prepared by a lawyer and registered against the buyer's title in the Land Titles Office.

In this scenario, the title is transferred to the buyer on the closing date. The buyer becomes the owner of the land subject to a mortgage in favour of the seller.

This type of arrangement is generally a disadvantage for the seller. The seller does not receive all of the purchase proceeds on closing. If the buyer fails to make his or her payments, the seller must proceed with foreclosure. The seller is eventually entitled to possession of the property through this process, but it can be time consuming and will attract the cost of legal fees.

Conditional Sales Agreement (also called Agreement for Sale)

A conditional sales agreement operates much in the same way as a mortgage back, with the seller financing the purchase and the buyer making regular payments. However, this arrangement differs from a mortgage back in that the seller remains the registered owner of the land until the debt is fully paid for. Only once the debt to the seller is fully paid is the title transferred to the buyer. In the meantime, the buyer has the use and possession of the property.

In this arrangement, the buyer can protect his or her interest by registering a caveat in the Land Titles Office. A caveat provides notice to all of the buyer's interest in the property and ensures that the land cannot be sold to someone else before the buyer has had a chance to complete his or her purchase.

The advantage of this arrangement over a mortgage back is that if the buyer does not make the payments, the seller may be able to cancel the agreement and takes the land back. Since the seller is still the registered owner of the land, he or she does not have to go through the complicated foreclosure procedures to get the land back. A term should be included in the agreement that in this event, all payments made to the seller by the buyer are forfeited and retained by the seller. There is federal and provincial legislation that protects farmers and can prevent a seller or lender from taking back the farm property or foreclosing on a farm mortgage or security agreement. Consult your lawyer for more information.

Interim Financing

If a buyer is paying for land with funds from a lending institution, the seller usually does not receive the purchase funds until approximately two weeks after the closing date. The buyer will sign the mortgage documents at or around the closing date. Those documents will be sent to the land titles office for registration. The land titles office will take several weeks to register the documents. Once registered, the buyer's lawyer will advise the buyer's lender that the documents are registered and will ask the lender to forward the purchase funds to the lawyer. The lender will not forward the purchase funds until they are assured their mortgage has been validly registered. It may take several days for the lender to process the request for funds and forward the funds to the buyer's lawyer. Once the buyer's lawyer receives the mortgage funds, the funds will be paid to the seller.

As a result, the seller usually will not receive their funds until several weeks after the closing date. The buyer is required to pay the seller interest at the buyer's mortgage interest rate for every day that the seller is without their funds past the closing date.

If the seller is also purchasing a separate property and if the purchase has the same closing date as the sale, the seller may need to obtain interim financing to ensure the seller's purchase can proceed. Interim financing is a short term loan that will be paid off when the seller receives the funds from the buyer.

Getting a Clear Title

Encumbrances

An encumbrance is a charge or claim against title to a piece of land. For example, if a landowner uses his or her land as collateral for a mortgage, the mortgage will be an encumbrance on the owner's title until fully repaid.

Encumbrances on a seller's title do not disappear simply because the land is being sold to you. If the title carries encumbrances, you may not be able to get full ownership and control of the land. As a buyer, you must find out whether there are any encumbrances before you arrange to receive title to the land. A statement in an agreement of purchase and sale that the property is to be sold "free and clear" of encumbrances is not a substitute to searching for and ensuring the encumbrances are cleared up by the vendor prior to closing. While such a statement may give the buyer legal recourse against the seller, the buyer may still be responsible to the third parties who registered the encumbrance against the title.

Once you are aware of all existing encumbrances, you must decide which you will allow to pass with the title and which you will not accept. You should never agree to accept an encumbrance with the title before first checking with a lawyer.

The following list describes the most common kinds of encumbrances.

1. Mortgage – A mortgage on a piece of land gives the lender rights to the land, as security or collateral for a loan. You can find out about mortgages registered against the title by examining the Certificate of Title. The document will not show how much money is still owing on a present mortgage. You need a lawyer to ensure the seller pays off any money he or she owes under a mortgage and registers a discharge of the mortgage, before you agree to have the title transferred to you. This is usually a standard clause in the Agreement of Purchase and Sale.

2. Lease – A person with a valid lease to a piece of land may have the right to continue farming the land even after it is sold. If someone is presently renting land that you plan to buy, he or she may farm it until the lease runs out if the lease is for three years or less or if it is for more than three years and is registered at the Land Titles Office. Since a lease for less than three years does not have to be registered to be protected, you will have to ask the seller if there is one in existence. Usually there is a clause in the agreement of purchase and sale stipulating if vacant possession is required or if a lease is being assumed.

3. Lien – A lien is a claim or charge registered against property by someone to whom the owner owes a debt. If the owner does not repay the debt, the property can be seized and sold to satisfy the debt. Two common types of liens are a tax lien and a builder's lien.

   A tax lien is when an owner fails to pay his or her property taxes. The municipality will register a lien against the title. It gives the authorities the right to seize and sell the land if the taxes are not paid within a certain period of time. You will have to get a tax certificate from the local municipal office to provide an up to date statement on the outstanding taxes. You must ensure the seller pays any outstanding taxes before you agree to receive title; otherwise you risk having to pay them yourself in order to keep the land.

   A builder's lien involves contractors (carpenters, plumbers, etc.) hired to improve or build on a piece of land. These people may have a claim against the land for the value of the work or material provided. If the owner does not pay them or if a contractor does not pay a subcontractor, the lien can be enforced. The contractor or subcontractor can get a court order for the land or any material on the land to be sold to pay off the debt. As a buyer you must ensure the seller has cleared up all builder's liens before you agree to take title. Otherwise, you may be responsible for paying these debts yourself.

4. Fixture Notice – If an owner has a fixture installed on the property and does not pay for it, the company who is owed the money and claims a security interest in the fixture can register a claim against the title. This is not uncommon with respect to the installation of bins. This fixture notice gives the company the right to remove the fixture from the property if the owner does not make all of the required payments.

5. Easements and Encroachments – An easement results when a landowner grants someone the right to cross, enter or use the property for certain purposes. An easement is also a right granted to someone to insist that the landowner not do something with the land, such as build certain kinds of buildings or obstruct drainage ditches. The most common type of easements are those granted to public utility companies such as Manitoba Hydro or Manitoba Telecom Services.

   An encroachment exists where part of the buildings or fixtures of one landowner extend onto another person's land – such as overhanging eaves or a fence or building extending over the property lines. When you buy land, it is quite possible that any easements and encroachments will not be registered on the title. You must ask the seller if any easements or encroachments exist.

6. Caveat – a caveat can be registered against an owner's title, in order to notify buyers or others that there might be a claim or interest in the land that could interfere with the title transfer. The following kinds of claims can be registered in the form of a caveat:

   a. ease claims
   b. homestead right claims
   c. unregistered mortgages
   d. options to buy
   e. easements
   f. agreements for sale
   g. unpaid vendor's liens
   h. restrictive covenants (promises by the landowners that they will not use the land in certain ways)

   A right of first refusal is not considered an interest in land and cannot be registered by caveat.

   If there are valid caveats registered against the seller's title when it transfers to you, you will be legally obligated to honor these claims. Therefore, before taking title, have the seller discharge any caveats you are not prepared to take responsibility for.

7. Pending Litigation Order – If someone is suing a landowner over a dispute involving the title, the person suing can register a notice of lis pendens at the Land Titles Office. This notice warns anyone (including a buyer) that their rights to the land could be overruled by a judgment of the court. While this notice remains on the title, the land is frozen so that the owner cannot sell to you until the lawsuit has been satisfied.

8. Certificate of Judgment – If a judgment arising from a lawsuit has been granted against a landowner, the judgment can be registered against the owner's title. The land may be seized if the debt is not paid. You should refuse to receive title to the land unless the seller clears up any judgment debt.

Searching the Title

It is necessary to have a formal search done at the Land Titles Office. The lawyer assisting you with your purchase will search the title for you. A copy of the title will be sent to the lawyer's office. The lawyer will review the title and all encumbrances listed thereon.

Some encumbrances may not be registered so the seller should be asked if he or she is aware of any encumbrances. A seller will be required to sign a sworn statement called a Declaration as to Possession at the time the closing documents are signed. One of the statements in the Declaration as to Possession should be a statement from the seller listing all encumbrances.

Transferring Title and Closing the Sale

The last stage in the sale of farm land is transferring the title and ownership of the land from the seller to the buyer. The legal name for this transfer process is conveyancing.

Steps in Transferring the Title

1. Searches and checks are completed – both parties should have checked into all aspects of the seller's title, including the status of existing encumbrances and amounts owing of utilities, taxes and mortgages. The seller must do everything necessary to make the title comply with all of the conditions of the sales contract, including eliminating encumbrances.

2. Seller makes statement of adjustments – in the agreement of purchase and sale, the seller and the buyer will have agreed on an adjustment date. This is the day on which the buyer first becomes responsible for paying land taxes, utilities and any other ongoing expenses that come with the land. Any pre-paid expenses will be adjusted between the buyer and the seller. Usually the adjustment take is the same day as the buyer takes possession (closing date). However, as stated previously, when buying vacant farm land, real property taxes are usually adjusted as of January 1 of the year of purchase. As stated previously, it is generally accepted that the person who has the benefit of the crop should be paying all of the real property taxes in that year.

Below is a sample of a Statement of Adjustments.

Statement Of Adjustments

Vendor: Mr. Johnston

Purchaser: Mr. Anderson

Property: SW 4-28-26 WPM
Date of Possession: 2017 05 01

Date of Adjustments: 2017 05 01

Purchase Price:		$80,000.00
Deposit:	$1,000.00	
Tax Adjustment:		
Taxes Paid to December 31, 2016		
Adjustment based on 2016 taxes		
-120 / 365 x 548.46 =	$180.32	
Cash to Close:	**$78,819.68**	
Totals	$80,000.00	$80,000.00

E. & O.E.

3. Seller signs transfer documents – The seller's lawyer will prepare the transfer documents including the Transfer of Land and the Declaration as to Possession. The Transfer of Land document legally transfers ownership of the land to the buyer. The Declaration as to Possession is a sworn statement by the seller that:

   - He or she actually possesses and owns the land.
   - All taxes, insurance, repairs or improvements, and fixtures are fully paid for.
   - There are no encumbrances affecting the land, except for those the document lists.
   - He or she is a resident of Canada.
   - The land is not subject to any builder's liens.
   - The property was used in the course of a business which may attract new taxation issues. (Please refer to the section respecting GST and commercial property as discussed earlier in this publication for more information on taxation issues and commercial property.)

4. Buyer signs mortgage documents – The buyer's lawyer will draft the mortgage documents in accordance with the lender's instructions and the buyer will sign them.

5. Buyer pays seller cash to mortgage – The buyer sends the seller the cash to mortgage money, which is the down payment part of the purchase funds and does not include the deposit. The balance of the purchase price, less the deposit, is financed with mortgage funds, which are not released to the seller until after the title transfer is registered. The buyer sends the cash to mortgage to the seller on condition that the seller will give the buyer a clear title to and possession of the land on the closing date.

6. Deposit – if a real estate agent has been involved in the transaction, he or she will retain the deposit paid at the time the Agreement of Purchase and Sale was executed. The agent will deduct their commission from the deposit. If any funds are left over, they will be forwarded to the seller's lawyer. If further funds are required to pay a balance owing on the commission, the seller's lawyer will forward the balance to the agent from the sale proceeds once received. If a real estate agent is not involved, the deposit will be held by the seller's lawyer and be applied to the outstanding purchase price owing to the seller on the closing date.

7. Buyer registers documents – The buyer's lawyer will register the Transfer of Land and the buyer's new mortgage in the Land Titles Office. It will take several weeks for the Land Titles Office to process these documents. As of January 3, 2016, the Land Titles Office charges $87 to register the Transfer of Land and $87 to register the mortgage.

8. Lender sends mortgage funds to the buyer's lawyer – once the Transfer of Land and mortgage documents have been registered in the Land Titles Office, the buyer's lawyer will request the mortgage funds from the buyer's lender. The buyer's lawyer will then send the mortgage funds to the seller, plus interest as previously discussed. Once the seller receives the mortgage funds, the sale is complete.

Trust Conditions

The lawyers for both the buyer and the seller protect their clients' interests throughout the conveyancing by imposing trust conditions on each other. For example, the seller's lawyer will give the buyer possession of the property on the trust condition that the buyer's lawyer will register the Transfer of Land and mortgage documents and request the mortgage funds from the lender.

Lawyer's Fees and Expenses

A lawyer who handles your sale or purchase of farm land will bill you for a basic fee for services and for any out of pocket expenses or disbursements.

You have every right to ask your lawyer in advance to estimate what you will be charged, and to explain what services will be included for that fee. You should ensure that you get a competent and experienced lawyer who best suits your needs.

Disbursements include costs of photocopying, postage, courier service to the Land Titles Office and other miscellaneous expenses. In addition, there will be Land Titles Office charges for searching the property and registering the Transfer of Land and mortgage. The buyer usually pays the costs of registering the Transfer of Land and mortgage. The seller will usually pay the costs of discharging any existing mortgage or other encumbrances from the title. Which party is paying which costs should be addressed in the Agreement of Purchase and Sale.

Roles of Professionals in the Sale

There are a number of practical, legal and financial matters that you must consider in the course of buying or selling farm land. Because your personal circumstances are unique, you will want to plan your purchase or sale in a way that will best meet your particular situation. Qualified professionals can help you make the best plans. They will also help protect your rights and interests throughout the sale.

Your Lawyer

Because a land deal is one of the more serious transactions that you are likely to be involved in, it is highly recommended that you contact your lawyer before you sign any contract. As well, writing up a sales contract and transferring title is very complicated. Your lawyer has the knowledge and experience to do so in the manner that reflects your wishes. As well, he or she will take the proper legal steps to protect your rights throughout the sale. You should hire a lawyer who you feel is competent and trustworthy.

Your Accountant

Your accountant can be very important to you before you sign a sales contract. He or she can help you analyze your financial situation, to see whether it is a good time for you to buy or sell. Your accountant will know all about the tax implications of your plans, and can discuss possible alternatives designed to save you tax dollars. He or she can also advise you on how best to finance the purchase or sale.

Your Real Estate Agent

Most land and house sales involve a real estate agent during the initial stage of the sale. He or she lists and advertises the land in order to attract buyers. When one is found, the agent may help complete the offer to purchase and take the deposit. A real estate agent helps the seller by taking away the work and worry of finding a buyer. As well, the agent is specifically trained to write up an offer to purchase that is complete and in satisfactory terms.

Your Lender

Your lender can help when it comes time to work out financing for the sale. As a seller, you can seek advice on the best arrangement for your purposes, especially if you wish to sell your land within your family. As a buyer, you can find out about the best mortgage for your financial situation.

FREQUENTLY ASKED QUESTIONS

Who is affected by *The Farm Lands Ownership Act*?

The act affects:

- individuals who are neither Canadian citizens nor permanent residents of Canada
- organizations totally or partly owned or controlled by non-Canadians
- publicly traded companies and other organizations whose ownership is open to non-Canadians

They must apply to the Manitoba Farm Industry Board for an exemption to acquire an interest in more than 16.2 hectares (40 acres) of farm land (in total) in Manitoba.

Do I own the mineral rights on and under my land?

Most rights to the minerals on land in Manitoba belong to the Crown. You can determine whether you own your minerals rights by searching your title in the Land Titles Office. If words similar to "...except for the mines and minerals retained by the Crown" form part of the legal description on your title, you do not own your mineral rights.

If I own my land jointly with my spouse, is my estate required to probate the jointly held land on my death?

No, jointly held land automatically vests in the survivor on the death of one joint tenant. Therefore, probating this land is not necessary and will save your estate probate fees.

If I own the home quarter where my family residence is in my name alone, does my spouse have to consent to the sale of the land?

Yes. Your spouse has Homestead Rights in the house and up to 129.5 hectares or 320 acres of surrounding land. As a result, your spouse must consent to the sale of and to the mortgage of this land. If you have land in your name alone that is not your homestead, your spouse's consent to transfer the land would not be necessary.

If someone is leasing my land and I sell the land, does the lease survive and continue after the sale?

It depends. If the lease is for less than three years, the lease would continue after the sale. If the lease is for more than three years and registered in the Land Titles Office, the lease would continue after the sale. If the lease is for more than three years and not registered in the Land Titles Office, the lease would not continue following the sale.

Is there an obligation to pay GST on the purchase of farmland?

Yes, Goods and Services Tax (GST) at the current rate of five per cent is required on the purchase of all commercial property. However if the buyer is registered for GST, he or she will be able to claim the GST as an input tax credit and get the tax back at some point in the future. There is a self-assessing option which avoids having to pay the GST at the time of sale. A buyer must self-assess the GST and claim an input tax credit on their GST return. The net effect is that no money is actually laid out at the time of purchase.

Can I sell land that contains a sewage ejector system?

Yes, you can sell your land but either the sewage ejector system must be decommissioned (shut down), an exemption to keep the sewage ejector system must be obtained from Manitoba Sustainable Development or the purchaser must accept responsibility for the current sewage ejector system.

As a seller, will I receive the sale proceeds on the date of possession?

A seller usually does not receive the sale proceeds until several weeks after the possession date. However, the seller receives interest from the purchaser for every day following possession that the seller does not have his or her funds. The Land Titles Office takes about two weeks to register and process the Transfer of Land. Only after the Transfer of Land is registered in the purchaser's name will the purchaser's financial institution release the money for the purchase.

What do I do if there are caveats registered against land that I wish to purchase?

Some caveats such as utility caveats filed by Manitoba Telecom Services or Manitoba Hydro remain in place after the sale and do not affect the ability of the seller to transfer clear title to the buyer. Other caveats such as lease claims must be dealt with before you purchase the property. Your lawyer will search the caveats to determine what they are about and then negotiations will be conducted with the seller to ensure they can be and will be removed by the seller.

Once an offer has been accepted, can it be changed?

No. It is very important that you agree with all terms in an offer prior to accepting it. Once it has been accepted, it cannot be changed unless the other party agrees. Ensure all conditions you will require, for example the ability to obtain financing, are part of the offer before acceptance.

Should I list my property with a realtor?

A realtor has expertise in selling land and can provide a wide advertising exposure to your property through a multiple listing service. A realtor may be able to sell the property faster and on better terms than you could on your own.

Are there any benefits to selling my property by auction sale?

An auction sale accelerates the sale process as the seller knows exactly when their property will sell. An auction takes the seller out of the negotiation process. Your neighbors will all feel that they had an opportunity to purchase the land through a public auction.

Does it matter how the sale price is allocated between land and buildings?

Yes. The seller will want less of the purchase price allocated to the building than to the land and vice versa. Both parties can submit their own numbers.

Is Land Transfer Tax payable on the purchase of farm land?

Yes, but there is an exemption if the purchaser is a farmer and will continue to farm the land.

For more information

- Contact your local Manitoba Agriculture Growing Opportunities (GO) Office.
- To find your nearest GO Office, call Manitoba Government Inquiry, toll free at **1-866-626-4862**.
- To find out more about the federal-provincial *Growing Forward 2* initiative and provincial programs and services, go to **manitoba.ca/agriculture**.

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